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In the Supreme Court
of the United States

OCTOBER TERM, 1947

No.....

WILLIAM RAY OLSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

TO: The Honorable the Supreme Court of the United States:

Your petitioner, WILLIAM RAY OLSEN, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause May 15, 1947, reversing the judgment of the United States District Court for the District of Oregon.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The private home of your petitioner was forcibly entered, and an article owned and kept in said home for the exclusive personal use of the occupants thereof was forcibly seized and removed by Government agents, purporting to act under the authority of the initial process of a warrant of seizure issued upon a libel of information filed under Sec. 304 of the Federal Food, Drug and Cosmetic Act (21 U.S.C.A. Sec. 334), wherein it was alleged, unsupported by proper verification, that the article had been shipped in interstate commerce, with accompanying false printed matter as to the curative value of the article for certain ailments.

The invasion of the home and the seizure of the article therefrom took place more than a month after the said article had come to final rest and use in the private home of its ultimate purchaser and user, with no intention of further resale, retransportation or use by others.

The article in question is a therapeutic device, concededly not inherently dangerous or harmful to anyone. Your petitioner and his mother, the purchasers and users thereof, have faith in the curative benefits of said device for the ailments from which they suffered, claimed to have been benefited by its use and are perfectly satisfied with it for the purpose for which it was purchased.

In order to present a clear cut issue of the important

legal and constitutional questions involved, your petitioner did not deny the allegations in the libel of information that at the time the article was shipped in interstate commerce it was accompanied by literature that contained some misleading and false statements as to the cures that could be effected by the machine. Your petitioner was more concerned with the preservation of the sanctity of his home, the protection of his property rights in said device and his right to self treatment in any manner he saw fit. Thus, the only issues involved at the trial of the case were the following:

FIRST: That the Government exceeded the powers vested in it under the Federal Food, Drug and Cosmetic Act in the following respects: (a) by unlawfully seizing a machine not inherently dangerous from the home of the ultimate purchaser and user long after the interstate transportation had ended and had come to a permanent rest, and while same was being kept and used by the purchaser for his own personal use with no intention of resale, retransportation or use by others, (b) by unlawfully seizing a machine not inherently dangerous from a private home in order that it might be condemned.

SECOND: That his constitutional rights were invaded in the following respects: (a) the right of privacy in the home, (b) the right of property in a machine which could be lawfully purchased and possessed and which was not inherently dangerous to him or to anyone else, and (c) the right of self treatment without Government interference, in other words, as so well

expressed by the late Justice Brandies "the right to be let alone".

The United States District Court for the District of Oregon upheld the contentions of the claimant and dismissed the libel. Its opinion is reported in the case of *United States v. One Article of Spectro-Chrome,* 66 Fed. Sup. 754.

Upon appeal, the decision of the District Court was reversed by the Circuit Court of Appeals; its opinion summarily disposing of these contentions by stating that they were "immaterial".

QUESTIONS PRESENTED

1. Does the Constitutional grant to Congress of the power to regulate interstate commerce permit of a construction of Sec. 304 of the Federal Food, Drug and Cosmetic Act so as to authorize the seizure for condemnation of an article not inherently dangerous or harmful, from the home of the ultimate purchaser and user, long after the interstate character of the shipment had ended, and the article had found permanent lodgment and use in said home, without intention of resale, retransportation or use by others?

2. Conceding that the article at the time it was shipped in interstate commerce was misbranded, within the meaning of the Act, but that it was not inherently dangerous or harmful to anyone, and, it was not unlawful to own and possess same, does not its seizure for

condemnation, from the private home of the owner and user, on initial process of warrant of seizure, issued upon a libel of information, unsupported by proper verification, violate the constitutional rights of said owner and user, to-wit: (a) the right of privacy in the home, (b) the right of property in the machine, and (c) the right of self treatment or the right to be "let alone"?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has decided an important question of statutory construction of a Federal law in violation of constitutional limitations, and in such a way as to violate the constitutional rights of your petitioner.

2. The questions at issue are of general importance and public interest. The precise points involved have not been but should be settled by this court. If the decision of the Circuit Court of Appeals is permitted to stand, it will encourage and authorize the forcible entry into thousands of homes and the seizure therefrom of countless kinds and varieties of drugs, devices and cosmetics, acquired for personal use and not inherently dangerous or harmful, if any of said drugs, devices or cosmetics had at some time in the far distance past been shipped in interstate commerce, accompanied by printed matter containing any exaggerated or misleading claims as to their therapeutic or curative benefits.

3. The decision of the Circuit Court of Appeals, in effect, holding that once an article is shipped in interstate commerce, in violation of the Federal Food, Drug and Cosmetic Act, it is *never* immune from pursuit, regardless as to where it may be found and regardless that the article is not inherently dangerous or harmful and is kept for personal use only and not for sale or transportation, is contrary to law, does violence to Article 1, Section 8, and the Fourth and Fifth Amendments of the United States Constitution; is at variance with its own decisions and is in conflict with the decisions of other Federal Courts.

4. No court had heretofore sanctioned the forcible entry of a private home and the seizure of the occupant's property therefrom, in order to condemn same.

JURISDICTIONAL STATEMENTS

The jurisdiction of this court is invoked under Sec. 240 of the Judiciary Act as amended (28 U.S.C.A. 347). The Circuit Court of Appeals for the Ninth Circuit has in this case decided an important question of Federal Constitutional rights and of construction of Federal Laws which have not been, but should be, settled by this court.

Judgment was entered in this case by the United States Circuit Court of Appeals on May 15, 1947.

PRAYER FOR WRIT

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directing the United States Circuit Court of Appeals for the Ninth Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on the docket "No. 11,403—United States of America, Appellant v. William Ray Olsen, Claimant and One Article of Device labelled in part Spectro-Chrome, Appellee", to the end that this case may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of the said United States Circuit Court of Appeals for the Ninth Circuit be reversed by this Court, and for such other relief as to this court may seem proper.

DATED this 21st day of July, 1947.

WILLIAM RAY OLSEN, Petitioner,
By Barnett H. Goldstein,
1225 Failing Building,
Portland, Oregon,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS IN COURTS BELOW

The opinion of the District Court is reported in *U. S. v. One Article of Spectro-Chrome,* 66 Fed. Sup. 754.

The Judgment of the Circuit Court of Appeals was entered on May 15, 1947. It is printed in full at R. 146-150.

Point I

The Circuit Court of Appeals erred in failing to so construe Sec. 304 of the Act so as to exclude from the scope of the words "at any time thereafter" proceedings against devices in the hands of the ultimate consumer after the interstate character of the shipment had ended.

It was never contended by the claimant, as indicated in the opinion of the Circuit Court of Appeals that Sec. 304 of the Act (21 U.S.C.A. Sec. 334) was unconstitutional. It *was contended* that this section of the Act was inapplicable and that the Federal Government exceeded its powers under the law when it invoked same to break into the private home of the ultimate consumer after the interstate character of the shipment had ended.

The Government's contention, in effect, is that under the law, as it construes it, the impress of interstate commerce when once acquired is never removed, but like Tennyson's Brook "goes on forever". In brief, that the article is *never* immune from pursuit and seizure by the Federal Authorities, wheresoever it may be found!

Even if the statute could be so construed it would nevertheless clearly exceed the powers granted to the Federal Government by the Commerce clause of the Constitution. (Article 1, Section 8).

The present holding of the Circuit Court of Appeals that it is immaterial that the article at the time of its seizure was not in interstate commerce and that it was in the home of the ultimate purchaser and user, but that it could be proceeded against at any time, if it had been misbranded while in interstate commerce, is at variance with the decisions of this court in *Shechter v. U. S.*, 295 U.S. 495—97 A.L.R. 947, and with its own decision in the case of *U. S. v. Phelps Dodge Merc. Co.*, 157 Fed. (2d) 453, which held that libel proceedings under the Act could not be enforced against alleged adulterated food after it had come to rest in the consignee's warehouse, and its decision in the case of *Alberty v. U. S.*, 159 Fed. (2d) 275, which likewise recognized the necessity of fixing the termination of an interstate shipment.

In contrast to the opinion of the Circuit Court of Appeals for the Ninth Circuit in this case, is the recent

decision of the Circuit Court of Appeals for the Fifth Circuit; that of *Sullivan v. U. S.* decided on May 12, 1947, and not yet reported. In that case an attempt was made to hold a local retail druggist criminally responsible for the sale of certain drugs after the interstate character of the shipment had ended. In reversing the judgment of conviction Justice Sibley, speaking for the Court, said:

> "The attempt here made is to extend subsection (k) so as to make criminal all retail sales from the interstate package, though made clearly in intrastate commerce, unless the label on the interstate package which has been broken be reproduced on the retail package. We believe no grocer or druggist thus breaking an interstate package for a retail sale has understood this was necessary, and it is said this case is the first effort to apply the Federal Act in this way. If the 'holding for sale' is held to refer to all would-be sellers, no matter where or when or in what quantities, of all foods and drugs and cosmetics which at some time had moved in interstate commerce, the field of enforcement of the Act will be multiplied many times. The reason urged for so expanding it, to-wit: the protection of ultimate consumers, only makes another difficulty; for while Congress may regulate interstate commerce to any extent and almost for any purpose it thinks proper, this extended application would be really a direct regulation for police purposes of what is plainly intrastate commerce, which is the peculiar province of the State."

Point II

The Circuit Court of Appeals erred in failing to so construe Sec. 304 of the Act so as to exclude from the scope other words "at any time thereafter" proceedings against devices that are not inherently dangerous, are not illegal to possess and that had come to a permanent rest in the private home of the ultimate purchaser and consumer.

The Circuit Court of Appeals held that it was immaterial that the Appellee had the article in his home; that he had paid for same—was satisfied with it and that the article was not inherently dangerous.

The purchase and possession of this article is not made unlawful. It cannot be compared to such outlawed objects as stolen goods, burglar tools, counterfeit coins, gambling paraphernalia, illicit liquor and the like, the possession of which may in some way be illegal and subject to seizure. Moreover, it is conceded that the article, as used, was not inherently dangerous or harmful to him or to anyone else.

No court has heretofore gone so far as to give such a broad scope to the Act which would make it possible for the Government to force its way into thousands of private homes of the ultimate purchasers and users and forcibly seize from their cupboards many kinds and varieties of drugs, devices and cosmetics that had at some previous time been shipped in interstate commerce

simply because they had been accompanied by false and misleading literature as to their therapeutic benefits. To give encouragement to the Federal agencies by the adoption of such construction of the Act would certainly lead to results never contemplated by Congress, and certainly not by the framers of the Constitution.

In this connection attention is called to the proceedings of a hearing held on April 11, 1947, before a subcommittee of the Committee on Agriculture, House of Representatives Eightieth Congress First Session on H.R. 1237, called the Federal Insecticide Act. Doctor Reed, Chief of the Insecticide Division, and Doctor Griffin, Assistant Chief, were testifying before the subcommittee presided over by Congressman Andresen as Chairman:

> "MR. REED: The suggestion we have made there is that the words 'in the original unbroken package' be added. We think that is necessary in order to make that part of the act workable.
>
> MR. GRIFFIN: The act as it stands at present would deny a person who received an insecticide in interstate commerce the privilege of breaking it up and selling it in smaller packages. He couldn't repack it or distribute it. He could only sell it in the registrant's package as it came. *The Solicitor's office informs us that they believe it would be going beyond the constitutional authority if we denied them that right. They believe that after a man has received the insecticide in interstate commerce he has a right to go ahead and repack it.*
>
> MR. ANDRESEN: That would come under, primarily, at least, under the jurisdiction of the

State authorities, too, after it has been received in interstate commerce?

MR. GRIFFIN: It should, yes.

MR. ANDRESEN: *So that the Federal Government would not necessarily have any jurisdiction over it after it reached its destination."*

While it is conceded that Congress is granted broad powers to regulate Commerce, it has no general powers to regulate for the promotion of the general welfare (*Carter v. Carter Coal Co.,* 298 U.S. 239).

Point III

Federal regulation and control of interstate commerce subject to limitations and guarantees of the Constitution.

(a) RIGHT OF PRIVACY:

This is the first attempt ever made to forcibly break into a private home and forcibly seize therefrom an article for condemnation, which was not inherently dangerous to anyone, after it had reached the hands of the ultimate user.

In the recent decision of *Harris v. U. S.,* 91 L. Ed. 13, this court decided that an officer making an arrest in a private home, and armed only with a warrant of arrest was justified in seizing evidence of any crime that he may find upon the premises. This decision occasioned a wide cleavage in this court.

As pointed out by Justice Frankfurter in his dissenting opinion, that a series of decisions of this court, with only an occasional diviation, have construed the 4th Amendment liberally to safeguard the right of privacy, and the fact that the goods seized were contraband does not make valid or authorize unlawful search and seizure. (*Boyd v. United States supra,* 116 U.S. 616; *Agnello v. United States,* 269 U.S. 20; *United States v. Lefkowitz,* 285 U.S. 452; *Gobarth v. United States,* 285 U.S. 334; *Nathenson v. United States,* 290 U.S. 411).

As likewise therein pointed out by Justice Murphy:

> "The key fact of this case is that the search was lawless. A lawless search cannot give rise to a lawful seizure, even of contraband goods.
>
> "Never has it been suggested by the Court that law enforcement officers can use illegal means to seize that which it is unlawful to possess. To break and enter, to engage in unauthorized and unreasonable searches, to destroy all the rights to privacy in an effort to uproot crime may suit the purposes of despotic power, but those methods cannot abide the pure atmosphere of a free society."

And as also pointed out therein by Justice Jackson:

> "In view of the long abuse of search and seizure which led to the Fourth Amendment, I do not think it was intended to leave open an easy way to circumvent the protection it extended to the privacy of individual life. In view of the readiness of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desireable, we should not make inroad on the rights protected by this Amendment."

The instant case presents a much more flagrant abuse of police powers because the United States Marshal invaded the home of a citizen who was not and could not be charged with the commission of any crime. Moreover, the goods seized could be lawfully used and purchased, and were not inherently dangerous or harmful to anyone. The only color of right that the United States Marshal had in breaking into the private home of your petitioner was based upon the Commerce clause of the Constitution, the grant of which was clearly exceeded by invading the home long after the interstate character of the article had ended and found permanent lodgment in your petitioner's home.

It will be noted that the libel proceedings filed by the Government was not verified by any person having knowledge of the facts, and failure of such verification, nullifies the warrant issued thereunder (*U. S. v. 8 Packages,* 5 Fed. (2d) 971). While this decision was challenged by the opinion in the case of *U. S. v. 935 Cases,* 136 Fed. (2d) 523, the opinion therein took careful pains to point out "that there is no element of search or invasion of the privacy of a citizen or of his home involved in the case at bar".

(b) THE RIGHT TO PROPERTY

Among the inalienable rights declared by our Constitution as belonging to each citizen is the right of acquiring and possessing property. For the Constitution to declare a right inalienable and at the same time leave to Congress unlimited power over it, would be to de-

stroy, not to conserve, the rights it vainly assumes to protect, thereby reducing the constitutional amendments to a form of words.

The Fifth Amendment to the Constitution of the United States declares that no person shall be deprived of his property without due process of law. The property in question was bought and paid for by the petitioner. It is not unlawful to possess same, even assuming that it had once been misbranded, it was not inherently or directly harmful or dangerous to him or to anyone else. Here the Government, simply on an initial process, breaks into a private home and forcibly seizes the machine for condemnation.

If it is upheld, the right to property in thousands of devices, drugs and cosmetics, notwithstanding that they are not inherently dangerous or harmful to the user, would be jeopardized if at any previous time, no matter how far in the distant past, such device, drug and cosmetic had been shipped in interstate commerce, with false or misleading representations as to its benefits.

(c) THE RIGHT OF SELF TREATMENT WITHOUT GOVERNMENTAL INTERFERENCE

The late Justice Brandies stated that the makers of the Constitution conferred as against the Government the right to be "let alone", the most comprehensive of rights and the right most valued by civilized man.

It is conceded that the device purchased by the claimant was not inherently or directly dangerous or

harmful. The claimant's use of the machine in any way he may see fit, without coercion by the Government is his own prerogative, just as it is the right and prerogative of a Christian Scientist to attempt to effect a cure of his bodily ailments without medical interference.

The question here involved is not the merits of the spectro-chrome, or whether it is preferable to submit oneself to treatment by doctors practicing medicine and surgery, or by practitioners of Christian Science, or by the rays of a machine. The issue here is the sacred and fundamental right of an individual to follow whatever practitioner or method of self treatment he pleases.

So far as the claimant was concerned, he was satisfied with the results achieved by treating his ailments by the emanation of the rays of this machine. Certainly the Government should not deny him the right to its use, simply because it believes that it would be preferable that he submit himself to medical or surgical care.

The right of belief in any particular religion without molestation on account thereof is guaranteed to every one by the First Amendment of the United States Constitution, which specifically enjoins Congress from making any law respecting the establishment of religion or prohibiting the free exercise thereof. Would it be contended that the followers of Mary Baker Eddy in the method of treating their ailments by religious faith could be forced to accept the treatment of medical practitioners?

It might be refreshing to recall the words of Thomas Jefferson, who wrote as follows:

> "The state has no jurisdiction over the conscience of the subject, nor the right to intervene between that conscience and his God. The care of every man's soul belongs to himself, but what if he neglected the care of it; what if he neglected the care of his health or estate, which more nearly relates to the state, WILL THE MAGISTRATE MAKE A LAW THAT HE SHALL NOT BE POOR OR SICK? The laws provide against injury from others, but not from ourselves. God himself will not save men against their wills." (Young Jefferson by Claude Bower).

CONCLUSION

To summarize the salient points in the case.

The machine or device had long since ceased to be a subject of interstate shipment. It had found permanent lodgment in the home of the claimant. It was his own private property—bought and paid for. The machine was not inherently dangerous. In its construction, it was not unlike thousands of other machines equipped with glass slides of different colors, radiating multicolored lights. It was clearly not injurious per se. It certainly could not, of its own physical operation, produce any direct physical injury to anyone. It was, according to the Government's own contention a useless piece of metal.

Regardless of the misleading or false printed statements, that accompanied the machine as to its efficacy

as a treatment and cure for certain diseases, the claimant believed and had faith that it could and did benefit his ailments. Whether the machine could be given credit therefor, or whether it was due to faith, or the power of suggestion, or to nature's own reservoir of healing powers in one's body, the fact remains that he was benefited by its use.

Upon no justifiable theory can the Government claim the right to invade his private home and take his private property away from him when that private property is not in and of itself directly injurious to him or to anyone else.

To the end that our citizens may be protected in their legal and constitutional rights; that Governmental agencies be enjoined and compelled to respect our Constitution as a living and virile document, your petitioner respectfully urges that a writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit so that this case may be determined by the Court and the decree of the Circuit Court of Appeals may be reversed by this Honorable Court and the decree of the District Court of the State of Oregon for the District of Oregon may be reinstated and affirmed.

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